IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05-01-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE S. RAJESWARAN

HABEAS CORPUS PETITION NO.961 OF 2006

Jainul Arabunisha
W/o. Noorul Ameen .. Petitioner

Vs.

1. The State of Tamil Nadu,
   Rep. by its Secretary to Govt.,
   Public (SC) Department,
   Fort St. George,
   Chennai 600 009.

2. Union of India, rep. by the
   Secretary to Government,
   Ministry of Finance,
   Department of Revenue,
   COFEPOSA Unit, Janpath Bhawan,
   'B' Wing, Janpath, Delhi. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Habeas Corpus to call for the records of the first respondent made in SR 1/1015-4/2002 dated 29.8.2002, quash the same, produce the body of Noorul Ameen and set at liberty the detenu Noorul Ameen son of Ahamed Gani, now detained in Central Prison, Madurai under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act.

WEB COPY

For Petitioner : Mr.B. Kumar
Senior Counsel for
Mr.R. Loganathan

For Respondent-1 : Mr.M. Babu Muthu Meeran
Addl. Public Prosecutor

For Respondent -2 : Mr.P. Kumaresan, ACGSC

https://hcservices.ecourts.gov.in/hcservices/

J U D G M E N T

P.K. MISRA, J

The wife of the detenu has filed this Habeas Corpus Petition challenging the order of preventive detention passed under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), hereinafter referred to as "the Act". Such order of detention was passed on 29.8.2002. However, the detention was served and executed only on 30.8.2006, after a gap of four years.

2. The grounds of detention reveal that the detenu arrived at Anna International Airport, Chennai from Singapore on 24.6.2002,. The detenu declared that he was in possession of goods valued at Rs.50,000/-. However, the baggage of the detenu was subjected to detailed examination which resulted in recovery of 20 Nos. of Siemens A36 cellphones without adopters, 55 Nos. of Samsung R20 cellphones with accessories, 5 Nos. of Siemens A36 cellphones without accessories, totally valued at Rs.3,88,000/- (CIF). However, the detenu did not have any valid document in support of the goods recovered. The goods were seized under mahazar. In the voluntary statement dated 24.6.2002, the detenu stated that he was getting Rs.2000/- as brokerage from Burma bazaar brokers for bringing those goods and was doing such act for the past one year. In a further statement dated 25.6.2002, the detenu has stated that he had received 80 cellphones on loan from one person named Manickam, who was a resident of Singapore. He had further stated that he was living in No.2/126, Middle Street, Pasipattinam and at the time of interrogation he was living in Saliappa house, Odavi stret, Pasipattinam in Ramanathapuram district. It was further indicated that the detenu had deliberately attempted to smuggle electronic goods in trade quantity by way of misdeclaration to evade customs duty and he was involved in earlier cases registered as OS.No.867/2001 dated 6.5.2001 and OS.NO.777/2002 dated 2.6.2002 and, therefore, he was a habitual offender. It is further recited that the detenu was arrested on 25.6.2002 and subsequently released on bail on 1.7.2002, on executing a bond for Rs.10,000/- with two sureties and had complied with the direction to appear daily before the Customs Department upto 31.7.2002. The total value of the goods seized was Rs.3,88,000/- (CIF) and Rs.5,82,000/- (M.V). On the basis of the aforesaid, the order of detention was passed on 29.8.2002. As already indicated, such detention order was executed on 30.8.2006.

3. Such order of detention is being challenged mainly on the following grounds :-

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(1) There is delay of four years in executing the order of detention which would belie the satisfaction that detention of the detenu was immediately required.

(2) No material was placed before the detaining authority relating to valuation of the goods allegedly smuggled. Even though the detenu in his representation has specifically called for the basis on which the value of the goods was calculated, such request was not complied with.

(3) A circular has been issued to the effect that no detention order should be passed when the value of the goods involved is less than Rs.5 lakhs and, therefore, there was no justification for passing the order of detention.

(4) The right of the detenu to make representation was affected as particulars regarding the cases OS.867/01 and OS.777/02 had not been furnished.

4. Learned Senior Counsel appearing for the petitioner has naturally placed strong reliance upon the fact that the order of preventive detention dated 29.8.2002 was executed only on 30.8.2006, after a gap of four years. It has been submitted by him that even though the detenu was available, no real effort had been made by the detaining authority to trace the detenu and execute the order of detention and, therefore, the order of detention should be quashed. In support of his contention he has placed reliance upon several decisions of the Supreme Court including (1995) 5 SCC 691 (P.M. HARI KUMAR v. UNION OF INDIA AND OTHERS), 2000 SCC (Criminal) 411 (A. MOHAMMED FAROOK v. JOINT SECRETARY TO GOVERNMENT OF INDIA AND OTHERS) and 2001 SCC (Criminal) 1579 (NARENDRA PUNJABHAI SHAH v. UNION OF INDIA AND OTHERS).

5. Learned counsel for the respondents, on the other hand, has placed reliance upon the decision of the Supreme Court in (2006) 3 SCC (Criminal) 270 (VINOD K. CHAWLA v. UNION OF INDIA AND OTHERS) and contended that the order of detention cannot be said to be vitiated merely because it could not be executed for the intervening period during which the detenu had evaded the authorities.

WEB COPY

6. In the counter affidavit filed on behalf of the first respondent it is stated that in response to the letter from the Customs Chennai, the Superintendent of Customs, Thondi vide letter O.C.No.529/2005 dated 25.8.2005 stated that the detenu was not available in the address 3/19, Middle Street, Pasipattinam, Ramanathapuram district in his village and the Administrative Officer, Thiruvadanai Taluk, Ramanathapuram issued a non-availability certificate with regard to the detenu on 29.8.2002. It has been further stated that copies of the detention order were

https://hcservices.ecourts.gov.in/hcservices/

issued to the Inspector General of Police, Intelligence, Chennai, Director General of Police, Tamil Nadu and Superintendent of Prisons, Central Prison, Madurai and if the detenu was available at his stated address, he would have been detained by the police authorities. It is further stated that wide publicity was given by placing public notice with the photograph of the detenu in the local newspapers, namely, the Indian Express and Dinamani published on 26.4.2003. The detenu was finally intercepted by the Customs authorities at the airport on 10.8.2006 and he was found holding another passport.

7. From these materials it appears that no sincere and concerted efforts had been made by the authorities to trace out the detenu in order to execute the order of preventive detention. As a matter of fact, in the counter it is indicated that detenu was not available in the address 3/19, Middle Street, Pasipattinam in Ramanathapuram district. Admittedly this address is the permanent address of the detenu, which is indicated in the order of detention itself. However, from the grounds of detention it is apparent that in the voluntary statement dated 25.6.2002, the detenu had stated that he was living in No.2/126, Middle Street, Pasipattinam, Ramanathapuram district and at present (i.e., at the time of passing the order of detention), he was living in Saliappa House, Odavi street, Pasipattinam, Ramanathapuram district. Nothing is indicated as to whether the authorities had tried to trace out the detenu in the address which he had furnished in his statement made before the customs authorities, which had been reflected in the grounds of detention itself. Apart from the above, the detenu had been released on bail by furnishing two sureties. Materials on record do not indicate that any steps had been taken to contact the sureties with a view to trace out the detenu. Similarly, if the detenu was actually an absconder, coercive steps should have been taken as contemplated in Section 7 of the Act. Section 7(1) is extracted hereunder:-

> "7. Powers in relation to absconding persons.- (1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may-
>
> (a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained where a warrant issued by the Magistrate;

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both."

8. A perusal of the aforesaid section makes it clear the procedure to be followed in case the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or concealing himself. Steps which have been taken as indicated in the counter affidavit clearly do not come within the contemplated steps as indicated in Section 7 of the Act.

9. In (1995) 5 SCC 691 (cited supra), there was delay of four years in executing the order of detention under the very same Act. The Supreme Court quashed such order of detention on the finding that the authorities did not make sincere and earnest efforts and take any urgent and effective steps which are available to them to serve the order of detention on the detenu.

10. In 1999 SCC (Criminal) 498 (cited supra), the order of detention under the very same Act was passed on 3.2.1997, but it was executed on 23.4.1998, after a lapse of about 14 months. After referring to the earlier decisions on the point, the Supreme Court quashed the order of detention by observing as follows :-

"13. Except making a vague allegation that the appellant was absconding and was apprehended on 23.4.1998 when the order was executed against him, the respondents have not given details of any steps that might have been taken in the meantime to execute the order against Ramesh Nahar. They could have taken appropriate steps under Section 7 of the Act or even under the provisions of the Criminal Procedure Code for securing the arrest of the husband of the appellant.

14. The detention order was passed on 3-2-1997 but it was executed on 23-4-1998. Obviously, the effect of non-execution of the order was that the authorities themselves gave liberty to the detenu to carry on his earlier activities giving rise, in that process, to a question whether the activities complained of were really prejudicial activities within the meaning of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Section 3 of the Act. As pointed out above, the execution of the order of detention long after it was passed would have the effect of vitiating the order as also the "satisfaction" of the authorities who passed that order."

11. In 2000 SCC (Criminal) 411 (cited supra), the order of detention was again under the very same Act, which was passed on 25.2.1999 and such order of detention came to be executed on 5.4.1999, i.e., after a gap of about 40 days. The Supreme Court quashed such detention order by observing as follows :-

"9. There is a catena of judgments on this topic rendered by this Court wherein this Court emphasised that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the petitioner could not be located at his residence or in his office and therefore the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time. From Annexure P-2 (the proceeding-sheet of the Metropolitan Magistrate's Court, Madras) it appears that the petitioner (accused) was present in the Court of the Additional Chief Metropolitan Magistrate on 25-2-1999 as well as on 25-3-1999. Despite such opportunities neither the detaining authority nor the executing agency as well as the sponsoring authority were diligent to serve the detention order on the petitioner at the earliest. In this view of the matter, we are of the opinion that the subjective satisfaction of the detaining authority in issuing the detention order dated 25-2-1999 is vitiated. It is in these circumstances not possible for us to sustain the detention order."

12. Keeping in view the observations made in the aforesaid decisions of the Supreme Court, it is apparent that in the present case no sincere and concerted efforts had been made and only sporadic efforts had been taken to trace out the detenu.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

The details of the steps taken are also lacking. In our opinion, by applying the ratio of the aforesaid decisions, the order of detention is liable to be quashed.

13. Learned counsel appearing for the respondents, however, has placed reliance upon the decision of the Supreme Court in (2006) 3 SCC (Criminal) 270 (cited supra). In the said case, the order of detention under the very same Act was passed on 12.2.1997 and could be served only on 12.3.1998, after a gap of about 13 months. However, it was found that notice under Section 7(1)(b) of the Act was published in the official gazette on 23.3.1997 and also in leading English and Hindi newspapers and application under Section 7(1)(a) of the Act was also moved before the Court for initiating proceedings under Sections 82 and 83 Cr.P.C and proclamation was made. Subsequently, an order of attachment under Section 83 Cr.P.C. was also issued. Keeping in view these concerted and continuous efforts, the Supreme Court came to the conclusion that in the facts of the said case the delay in execution has been adequately explained and therefore the order of detention has not been vitiated.

14. In our opinion, the facts of the said case are completely distinguishable from the present case. As already indicated, no serious and concerted efforts have been made in the present case, particularly in accordance with Section 7 of the Act to apprehend the detenu. The decision of the Supreme Court in (2006) 3 SCC (Criminal) 270 (cited supra) is therefore not applicable to the facts of the present case.

15. Once it is held that there has been long and undue delay in executing the order of detention and the order of detention is liable to be set aside on such ground, it is not necessary to deal with the other contentions raised on behalf of the petitioner.

16. For the aforesaid reason, the Habeas Corpus Petition is allowed and the order of detention is quashed. The detenu is directed to be released forthwith unless his presence is required in connection with any other case.

WEB COPY

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

https://hcservices.ecourts.gov.in/hcservices/

To

1. The Secretary to Govt.,
   Public (SC) Department,
   Fort St. George,
   Chennai 600 009.

2. The Secretary to Government,
   Union of India,
   Ministry of Finance,
   Department of Revenue,
   COFEPOSA Unit, Janpath Bhawan,
   'B' Wing, Janpath, Delhi.

3. The Public Prosecutor,
   High Court, Madras

4. The Joint Secretary
Public (Law and Order)
Department, Fort St. George, Chenani-9.

5. The Superintendent
Central Prison, Madurai.

6. The Sub Assistant Registrar,
Cofeposa Department, High Court, Madras.

HCP.961/2006

JRG (CO)
kk 19/1

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/